Office - Supreme Court, U. S.
FILED
JAN 6 1943
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 325

JEROME PARKER JEROME,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER.

JOHN T. SAPIENZA,
Counsel for Petitioner.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Summary of argument	4
Argument:	
In entering a national bank with intent to do an act which is neither a federal nor a common-law felony, the petitioner was not guilty of entry with intent to commit a felony within the meaning of the Bank Robbery Act	6
I. The Bank Robbery Act requires entry with intent to commit a federal felony affecting the bank	8
A. The Act defines a limited group of offenses (robbery, burglary and larceny) against banks	8
B. On the face of the statute, the phrase "any felony" clearly refers to federal felonies affecting the banks	11
C. The legislative history of the Bank Robbery Act shows that Congress did not intend to include state felonies	18
II. The Bank Robbery Act requires entry with intent to commit a common-law felony affecting the bank	26
Conclusion	28
Appendix "A"	29
Appendix "B"	32

CITATIONS

Cases:

Albrecht v. *United States*, 273 U. S. 1	24
Arnold v. *State*, 127 Tex. 89	18
Bannon v. *United States*, 156 U. S. 464	13, 16, 27
Carpenter v. *Hudspeth*, 112 F. (2) 126	24
Collins v. *McDonald*, 258 U. S. 416	12
Commissioner v. *Beck's Estate*, 129 F. (2) 243	17

Page

Considine v. *United States*, 112 Fed. 342 16
Conyer v. *United States*, 80 F. (2) 292 . . . . . 12, 16
Crabb v. *Zerbst*, 99 F. (2) 562 17
Deal v. *United States*, 274 U. S. 277 22
D'Oench, Duhme & Co. v. *F. D. I. C.*, 315 U. S. 447 12
Ebeling v. *Morgan*, 237 U. S. 625 24
Farrington v. *Tennessee*, 95 U. S. 679 16
Fasulo v. *United States*, 272 U. S. 620 17
Fox v. *State*, 5 How. 410 6
Hallock v. *United States*, 185 Fed. 417 16
Harrison v. *United States*, 163 U. S. 140 27
Hudspeth v. *Melville*, 127 F. (2) 373 . . . . . 6, 23
Hudspeth v. *Tornello*, 128 F. (2) 172 . . . . . 6, 23
Lanzetta v. *New Jersey*, 306 U. S. 451 11
Levinson v. *United States* 27
McCulloch v. *Maryland*, 4 Wheat. 316 10
Moore v. *Chesapeake & Ohio Railway*, 291 U. S. 205 14
Morgan v. *Devine*, 237 U. S. 632 24
National Bank v. *Matthews*, 98 U. S. 621 17
Oliver v. *United States*, 230 U. S. 971 27
People v. *Bigelow*, 94 Cal. App. 28 18
People v. *Thomas*, 63 Cal. 482 24
Railroad v. *Grant*, 98 U. S. 398 17
Reagan v. *United States*, 157 U. S. 301 . . . . . 13, 16, 27
Russell v. *United States*, 119 F. (2) 686 16
Seaboard Air Line Railway v. *Horton*, 233 U. S. 492 . . . . . 14, 16
State v. *Merriweather*, 136 Kan. 337 18
Territory v. *Willard*, 8 Mont. 328 24
Todd v. *United States*, 158 U. S. 278 17
United States v. *Baugh*, 1 Fed. 784 16
United States v. *Chase*, 135 U. S. 255 17
United States v. *Coppersmith*, 4 Fed. 198 . . . . . 6, 15
United States v. *Cohen*, 274 Fed. 596 17
United States v. *Cohen Grocery Co.*, 255 U. S. 81 11
United States v. *Daubner*, 17 Fed. 793 16
United States v. *De Quilfeldt*, 5 Fed. 276 16
United States v. *Falkenheimer*, 21 Fed. 624 16
United States v. *Freeman*, 3 How. 556 14
United States v. *Gradwell*, 243 U. S. 476 17
United States v. *Kraus*, 270 Fed. 578 12
United States v. *Mangus*, 33 F. Supp. 596 16

Page

United States v. *Nickerson*, D. N. J. Unreported 26, 27
United States v. *Novech*, 273 U. S. 202 24
United States v. *Palmer*, 3 Wheat. 610 27
United States v. *Patton*, 120 F. (2) 73 . . . . . 12, 23, 27
United States v. *Resnick*, 299 U. S. 207 17
United States v. *Slutzky*, 79 F. (2) 504 26
United States v. *Smith*, 5 Wheat. 153 27
United States v. *Stewart*, 311 U. S. 60 14
United States v. *Trinder*, 1 F. Supp. 659 17
United States v. *Weil*, 46 F. Supp. 323 6
Westfall v. *United States*, 274 U. S. 256 10
Ex parte Wilson, 114 U. S. 417 27
In re Wilson, 18 Fed. 33 . . . . . 6, 16

Statutes:

Act of July 7, 1898, 30 Stat. 717, as amended March 4, 1909, 35 Stat. 1145, 18 U.S.C. Sec. 468 . . . . . 16, 32
Act of May 25, 1900, 31 Stat. 188, as amended March 4, 1909, 35 Stat. 1137, 18 U.S.C. Sec. 392 32
Act of February 2, 1903, 32 Stat. 793, as amended March 4, 1909, 35 Stat. 1151, 18 U.S.C. 549 33
Act of March 4, 1909, 35 Stat. 1151, as amended June 19, 1937, 50 Stat. 304, 18 U.S.C. 542 33
Act of June 25, 1910, 36 Stat. 821, 18 U.S.C. Sec. 722 34
Act of March 1, 1913, 37 Stat. 699 35
Act of March 3, 1917, 39 Stat. 1069, as amended March 4, 1917, 39 Stat. 1202, February 24, 1919, 40 Stat. 1151, 18 U.S.C. Sec. 341 32
Act of June 11, 1932, 47 Stat. 301, 18 U.S.C. Sec. 622a 34
Act of May 18, 1934, 48 Stat. 782, 18 U.S.C. Sec. 408e 32
Act of February 22, 1935, 49 Stat. 31, 15 U.S.C. Sec. 715b 35
Act of June 25, 1936, 49 Stat. 1928, 27 U.S.C. Sec. 223 35
Bank Robbery Act (Act of May 18, 1934, c. 304, 48 Stat. 783, as amended Act of August 24, 1937, c. 747, 50 Stat. 749, 12 U.S.C. 588b(a)) 29
Sec. 1 29
Sec. 2(a) . . . . . *passim*
Sec. 2(b) . . . . . *passim*
Sec. 2(c) . . . . . *passim*
Sec. 3 9
Sec. 4 35

Page

Criminal Code
Sec. 37, 18 U.S.C. Sec. 88 11
Sec. 192, 18 U.S.C. Sec. 315 22
Sec. 335, 18 U.S.C. Sec. 541 ..... 2, 13, 15, 30
Federal Reserve Act, 49 Stat. 684, 12 U.S.C. Sec. 264(c) 8, 30
National Stolen Property Act, 48 Stat. 794, as amended 53 Stat. 1178, 18 U.S.C. Secs. 413–19 ..... 14, 23
The Mann Act, 36 Stat. 825, 18 U.S.C. Sec. 398 11
Narcotics Act, 38 Stat. 786, as amended 44 Stat. 1023, 1382, 26 U.S.C. Sec. 2553 11
Rev. Stat. Sec. 5209, as amended, 40 Stat. 972, 49 Stat. 704, 712, 18 U.S.C. Sec. 592 12
12 U.S.C. Secs. 596, 597 15
28 U.S.C. Sec. 424 15
Kan. Gen. Stat. (1935) Sec. 21–107(a), Sec. 21–108 18
N. J. Rev. Stat. (1937) Sec. 2: 132–1b 26
Public Laws of Vermont (1933)
Secs. 8400–8401 25
Secs. 8436–37 26
Sec. 8440 25
Sec. 8442 25
Secs. 8484–85 ..... 6, 30
Sec. 8750 ..... 6, 13, 30

Miscellaneous:
78 Cong. Rec. 2947 ..... 20, 24
78 Cong. Rec. 5738 19
78 Cong. Rec. 8132 20
81 Cong. Rec. 2731 20
81 Cong. Rec. 4656, 5376–77 21
81 Cong. Rec. 5409, 9197–98, 9331 21
1 Law and Contemporary Problems, 445, 448–49 20
Blackstone Comm., 227–28 22
Clark and Marshall, Crimes (3d ed.), Sec. 3, 392 ..... 6, 27
Hale P. C., 561–62 22
Wharton, Criminal Law (10th ed.), Sec. 23, 181, 633 ..... 6, 24 27
H. Rep. No. 1461, 73d Cong., 2d Sess., p. 2 ..... 19, 24
H. Rep. 1598, 73d Cong., 2d Sess 20
H. Rep. No. 732, 75th Cong., 1st Sess 11, 21
S. Rep. 537, 73d Cong., 2d Sess 19
H. Rep. No. 1668, 76th Cong., 3d Sess. 22
S. Rep. No. 1259, 75th Cong., 1st Sess 11

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 325

JEROME PARKER JEROME,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER.

Opinions Below.

The majority (R. 1-8) and dissenting (R. 9-17) opinions in the circuit court of appeals are reported at 130 F. (2d) 514.

Jurisdiction.

The judgment of the circuit court of appeals was entered August 3, 1942 (Tr. 65[1]). The petition for a writ of certio-

[1] The reference "Tr." is to the stenographic transcript of the record in the lower court, which is on file in the office of the clerk of this Court. Only the opinions in the court below and this Court's orders granting petitioner's motion for leave to proceed *in forma pauperis* and allowing certiorari have been printed. The reference "R." is to this printed record.

rari was filed August 21, 1942 and was granted October 12, 1942 (R. 17-18). The jurisdiction of this Court rests upon Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented.

Whether a person who enters a national bank with intent to utter a promissory note with a forged endorsement (which utterance is a felony under state law but not under federal or common law), is guilty of entering with intent to commit "any felony or larceny" within the meaning of the Bank Robbery Act.

Statutes Involved.

The controlling statutory provision, part of the Bank Robbery Act (Act of May 18, 1934, c. 304, 48 Stat. 783, as amended by the Act of August 24, 1937, c. 747, 50 Stat. 749, 12 U. S. C. 588b (a)), reads as follows:

> "* * * whoever shall enter or attempt to enter any bank, or any building used in whole or in part as a bank, with intent to commit in such bank or building, or part thereof, so used, any felony or larceny, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both; * * *."

The Bank Robbery Act, Section 335 of the Federal Criminal Code, and certain Vermont statutes, which may be relevant, are quoted in full in Appendix A, *infra*, pp. 29-31.

Statement.

On October 14, 1941, the petitioner was indicted for alleged violation of Section 2(a) of the Bank Robbery Act. The indictment charged that he entered a national bank in Burlington, Vermont, "with intent to commit in such bank a

felony, to wit, knowingly, wilfully and feloniously to utter and publish to said bank, as true, a promissory note in the amount of Five Hundred Dollars ($500.00), with the endorsement thereon of 'Henry S. Derby,' which endorsement was forged, the said Captain Jerome Parker Jerome, alias Jerome P. Jerome, alias J. Parker Jerome, well knowing said endorsement to be forged, with intent to defraud said bank and the said Henry S. Derby; * * *" (Tr. 5-6). Utterance of a forged endorsement is felonious under the law of Vermont, but not under federal or common law. See p. 6, *infra*.

Evidence was introduced by the Government to show that on July 14, 1941, the petitioner, then a captain in the United States Army stationed at Fort Ethan Allen, Vermont, entered the Howard National Bank and Trust Company of Burlington, Vermont, for the purpose of borrowing $500.00. A note was made out for his use and given to him, with the statement that he would need the endorsement of another Army officer of at least equal rank. Later in the day the petitioner returned with the note bearing his signature and the endorsement of Henry S. Derby, Major, 71st Field Artillery Brigade. The note was discounted by the bank, and matured August 1, 1941. At the time of the trial it had not been paid, except for $48.24, the petitioner's balance at the bank which was applied upon the note at the due date. Major Derby testified that he did not sign the note or authorize the use of his name and that, in fact, he was not at Fort Ethan Allen on July 14, 1941 (Tr. 9-22).

Upon this evidence the jury returned a verdict of guilty to the charge in the indictment and the petitioner was sentenced to imprisonment for one year and a day (Tr. 32-33). Throughout the proceedings in the District Court, the petitioner contended that the indictment did not charge an offense against the laws of the United States (Tr. 7, 22-24, 30-32).

On appeal, the conviction was affirmed by a divided court (Tr. 65). In an opinion by Circuit Judge Clark, the majority rejected petitioner's contention that the evidence was insufficient to show knowledge on his part that the endorsement was forged and held that the words "any felony" in Section 2(a) of the Bank Robbery Act include all offenses which are felonious under state law (R. 1-8). Judge Frank, in a vigorous dissent, held that the words "any felony" mean any federal felony affecting a bank covered by the Bank Robbery Act; he made no comment upon the sufficiency of the evidence (R. 9-17).[2]

Summary of Argument.

The phrase "any felony" refers only to any federal felony affecting national and insured banks. The legislative purpose was to punish robbery, burglary and larceny of banks. Congress had no concern in other crimes committed in, but not against banks. Those were left to the states.

Under our federal system, Congress and the state legislatures are sovereign in their respective spheres. Each must be presumed to legislate without reference to the other. Congressional adoption of state law is the exception rather than the rule. By reference to other portions of the Bank Robbery Act and other federal statutes concerning the banks covered by the Bank Robbery Act, the words "any

[2] Although the petition for writ of certiorari did not question the sufficiency of the evidence, it may be questioned whether the Government proved beyond a reasonable doubt that the petitioner knew the endorsement was forged or that he had any intent to defraud—essential elements of the state felony charged. There was no direct evidence. The jury could have found the petitioner guilty only by inferring that he knew the endorsement was forged and then, upon the basis of that inference, by making the further inference that petitioner had the intent to defraud the bank to which the note was passed for value. It is just as plausible, however, to infer that he intended and had confident expectation of being able to pay his note on the due date.

felony" are given a content which effectuates the purpose of Congress. They mean robbery of the bank (larceny is specifically named), and any other act affecting the bank which is in violation of Section 2(c) of the Bank Robbery Act, National Stolen Property Act or any other present or future federal statute. This method of construction is consistent with the construction of "felony" in other statutes of Congress, as well as the well-established legislative practice of referring to the laws of the states when an act is made penal under federal law because it is criminal under state law.

The legislative history of the Bank Robbery Act shows very clearly that Congress did not intend to include state felonies. In 1934 it rejected a bill submitted by the Attorney General, which specifically defined intent as the intent to commit any felony under state or federal law. This bill had been drafted in accordance with the usual practice of Congress of referring to state law if state law was to be incorporated. Only three years later the same Attorney General submitted a bill which made no reference to state law, and Congress adopted the bill after changing "any larceny or other depredation" in the original proposal to "any felony or larceny." But the law made no reference to state felonies.

Nor is there any need to import state law into the Bank Robbery Act. All the elements of the three offenses are defined specifically in the Act or in other federal laws. In view of the familiar rule that a criminal statute should be construed strictly in favor of the defendant, any doubts must be resolved in favor of the petitioner and state felonies must be deemed excluded.

In the alternative, we submit that the terms "any felony or larceny" were taken from the common law and should be given their common-law meaning.

ARGUMENT.

In entering a national bank with intent to do an act which is neither a Federal nor a common-law felony, the petitioner was not guilty of entry with intent to commit a felony within the meaning of the Bank Robbery Act.

Utterance of a promissory note with a forged endorsement is not a crime under the laws of the United States. At common law it was a misdemeanor. See *In re Wilson*, 18 Fed. 33, 34 (E. D. Mich.); WHARTON, CRIMINAL LAW (10th ed.) Sec. 653. *Cf. Fox* v. *State*, 5 How. 410, 433; *United States* v. *Coppersmith*, 4 Fed. 198, 207 (C. C. W. D. Tenn.). At present, however, it has been made a felony by statute in most states. CLARK AND MARSHALL, CRIMES (3d ed.) Sec. 392. The Vermont Statute provides that a person who utters and publishes as true an endorsement of a promissory note, knowing it to be forged, with intent to injure or defraud another, shall be imprisoned in the state prison not more than ten years and fined not more than one thousand dollars. *Vt. Pub. Laws* (1933) Secs. 8484-85, quoted *infra* p. 31. Since offenses punishable by imprisonment in the state prison are defined as felonies, utterance of a forged endorsement upon a promissory note is felonious under Vermont law. *Id.* Sec. 8750. The question, therefore, arises whether "intent to commit * * * any felony" in the Bank Robbery Act, includes the intent to commit state felonies in national and insured banks.

The scope of the two words "any felony" has given rise to sharp disagreement among the members of the lower court and those of the Circuit Court of Appeals for the Tenth Circuit. Moreover, there is not complete agreement even between the majorities in the two circuits. The majority below has expressed the most extreme view—that the phrase "any felony" includes all state and federal

felonies committed in banks, whether directed against them or against persons who happen to be on the premises. The majority of the Circuit Court of Appeals for the Tenth Circuit has restricted the phrase to acts committed in a bank which have some relation to its protection, preservation and efficiency and which constitute a felony under the laws of the state in which the bank is located. *Hudspeth* v. *Melville*, 127 F. (2d) 373, 376; *Hudspeth* v. *Tornello*, 128 F. (2d) 172, now pending on petition for a writ of certiorari, No. 163, this Term.

In each of these cases and in the court below, strong protests were entered against the views of the majority. Judge Frank in the lower court and Judge Huxman in the Tenth Circuit both agreed that the words refer only to federal felonies affecting the banks. See R. 10; *Hudspeth* v. *Melville*, *supra*, at 377. In the *Tornello* case Judge Huxman, impelled by constitutional considerations, seems to have restricted them further to felonies defined by the Bank Robbery Act itself. Accord: *United States* v. *Weil*, 46 F. Supp. 323, 326 (E. D. Ark.)

We submit that the dissenting judges are clearly right in construing the statute as inapplicable to entries with intent to commit state felonies. The purpose of the statute was to punish a limited class of crimes against national and insured banks—a purpose fully accomplished by restricting burglary to entry with intent to commit a federal felony against the bank. The legislative history of the Act is clear demonstration that Congress did not intend to include state felonies. As an alternative construction of the statute, we suggest that the words "any felony" contemplate common-law felonies, not common-law misdemeanors made felonious by state statutes. Under either view, the statute is inapplicable to the petitioner, since uttering a forged endorsement is neither a federal nor a common-law felony.

I. The Bank Robbery Act requires entry with intent to commit a Federal felony affecting the bank.

A. The Act Defines a Limited Group of Offenses (Robbery, Burglary and Larceny) Against Banks.

Section 2 (a) of the Bank Robbery Act is a penal statute. It created the three specific offenses of robbery, burglary and larceny against national banks and state banks insured under the Federal Reserve Act, as amended (49 Stat. 684, 12 U. S. C. Sec. 264 (c)),[3] Assault with a dangerous weapon or device, murder and kidnapping in connection with the robbery, burglary or larceny were included in other portions of the statute. So was the receipt, possession or disposition of money or property known to have been taken in violation of Section 2 (a). But the primary goal was federal prosecution and punishment of robbery, burglary and larceny of the banks.

The 1934 Act was concerned only with bank robbery and with murder and kidnapping in the course of or immediately after the robbery. A bank robber was defined as one who "by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money or any other thing of value belonging to or in the care, custody, control, management, or possession of, any bank, . . ." The penalty was fixed at a fine of not more than five thousand dollars or imprisonment of not more than twenty years, or both. Section 2 (b) increased the penalty if the

[3] In 1934 the term "bank" in the statute was defined as "any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States." In 1935 the definition was extended to include "any insured bank as defined in subsection (c) of Section 12B of the Federal Reserve Act, as amended." Thus, the statute protects not only national banks but numerous state banks scattered throughout the United States.

robbery was committed by the use of a dangerous weapon or device, and Section 3 authorized stiffer punishment, including death if the verdict of the jury so directed, for murder or kidnapping in the course of a bank robbery, or in avoiding arrest, or in escaping from arrest or confinement for such robbery.

In 1937, at the request of the Attorney General, Congress amended "the bank-robbery statute to include burglary and larceny." Title of 1937 Act, 50 Stat. 749. The two new federal crimes, burglary and larceny of a bank, were placed in the same subdivision as robbery. A burglar was defined as one "who shall enter or attempt to enter any bank, or any building used in whole or in part as a bank, with intent to commit in such bank or building, or part thereof, so used, any felony or larceny, * * *" The same punishment was ordered for both burglary and robbery. Larceny was divided into two grades: Stealing from the bank anything of value exceeding fifty dollars was made a felony and stealing anything of less value, a misdemeanor. The two classes of larceny were defined in the following terms:

> "* * * whoever shall take and carry away, with intent to steal or purloin, any property or money or any other thing of value exceeding $50 belonging to, or in the care, custody, control, management, or possession of any bank, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or whoever shall take and carry away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $50 belonging to, or in the care, custody, control, management, or possession of any bank, shall be fined not more than $1,000 or imprisoned not more than one year, or both."

The Bank Robbery Act was clearly aimed only at three offenses committed against banks in which the United

States has an interest. There was no attempt to enact a comprehensive criminal code covering all crimes against the banks. For example, the commission of arson and fraud against banks was not made a federal offense. The control of these and other crimes was left to the states. This, of course, was recognition of the fundamental principle that suppression of crime is primarily the responsibility of the state and local law-enforcement officers, and that Congress should interfere with traditional state functions only when and to the extent necessary. See pp. 19-20, *infra*.

The lower court took the position, already noted, that Congress went beyond offenses directed against the banks themselves and intended to punish entry with intent to commit any state or federal felony without limitation (R. 4, 7-8). Although the Government states that there is no occasion to decide whether entries with intent to commit state felonies not affecting the financial condition of a bank are also included, since the petitioner's offense, if within the statute, would affect the financial condition of the Bank (Br. pp. 9, 32), nevertheless it contends that the phrase "any felony" plainly and naturally means both state and federal felonies without limitation (Br. pp. 9-11, 29).

It is obvious, we think, that the statute must be directed at acts which affect the protection, preservation and efficiency of the banks. The power of Congress to enact legislation creating and punishing crimes in or against national and insured banks is not unlimited. *Cf. McCulloch* v. *Maryland*, 4 Wheat. 316, 421-23. Congress has no general police power over the nation. Criminal legislation concerning banks must be reasonably related to the protection, preservation and efficiency of banks in which the Government of the United States has some interest. *Westfall* v. *United States*, 274 U. S. 256, 258-59.

Congress recognized these limitations. As pointed out above, the entire Bank Robbery Act is aimed only at crimes

against the banks. Even robbery and larceny are not federal crimes merely because the persons whose money is taken happen to be in a protected bank at the time. The legislative history of the 1937 amendment to the Act, discussed more fully below, dispels any doubt on this score. The Attorney General requested amendment of the Bank Robbery Act to include "burglary and larceny of a bank," and the committees reported proposed legislation to add "larceny and burglary of the banks protected by this statute." H. Rep. No. 732, 75th Cong., 1st Sess.; S. Rep. No. 1259, 75th Cong., 1st Sess. Having taken deliberate precautions to punish offenses committed against banks and to enact an amendment to prohibit burglary "of" banks, Congress surely could not have intended burglary to cover entry with intent to commit any felony whatever upon bank premises, whether or not directed at the bank.[4] Indirection or subtlety should not be imputed to Congress in the definition of federal crimes. Penal statutes must be obvious and definite on their face. *United States* v. *Cohen Grocery Co.*, 255 U. S. 81; *Lanzetta* v. *New Jersey*, 306 U. S. 451.

B. On the Face of the Statute, the Phrase "Any Felon," Clearly Refers to Federal Felonies Affecting the Banks.

In creating the three crimes of bank robbery, burglary and larceny, Congress demonstrated on the face of the statute that it alone would define them. Nowhere is there the slightest indication that state law was to control or apply to any element of those crimes.

---

[4] Federal felonies which would not be offenses against banks include conspiracies to defraud the United States, Crim. Code, Sec. 37, 18 U. S. C. Sec. 88; sale of narcotics, 38 Stat. 786, as amended, 44 Stat. 1023, 1382, 26 U. S. C. Sec. 2553; violation of the Mann Act, 36 Stat. 825, 18 U. S. C. Sec. 398. Felonies under state laws which would not be offenses against the banks, include rape and adultery. Entry into a national or insured bank, with intent to commit any of those felonies, could not possibly affect the bank; it is not the kind of entry which could be called burglary of the bank.

The background is significant. In 1934 Congress spelled out exactly what it meant by robbery. It certainly had no intention of incorporating state law with respect to robbery. In 1937 Congress amended the act by adding burglary and larceny. Again it stated each element of the two offenses. Larceny was fully defined. State law on larceny is immaterial. Burglary, too, is self-sufficient, except for the words "any felony or larceny." The "larceny" undoubtedly meant is larceny as defined in the same subsection.[5] Here again no resort to state law is intended. Section 2(a) would be completely self-contained, except for the words "any felony" in the definition of burglary. But these derive meaning from other portions of the Bank Robbery Act and other federal penal statutes.

The Bank Robbery Act is but one of many criminal laws enacted by Congress. It must be considered part and parcel of the body of federal penal laws. Since "felony" in the statute of 1937 is unqualified, the obvious place to seek its content is in the same or other related Congressional Acts. *Conyer v. United States*, 80 F. (2d) 292, 294 (C. C. A. 6) ("felony" in Espionage Act refers to any felony under the laws of the United States); *United States v. Kraus*, 270 Fed. 578, 582 (S. D. N. Y.). See also *Collins v. McDonald*, 258 U. S. 416, 419-20. "Federal law • • • is found in the federal Constitution statutes, or common law." Jackson, J., in *D'Oench, Duhme & Co. v. F. D. I. C.*, 315 U. S. 447, at 471-72.

In some statutes Congress has defined various offenses and denominated them felonies or misdemeanors. See, *e. g.* Rev. Stat. Sec. 5209, as amended, 40 Stat. 972, 49 Stat. 704, 712; 12 U. S. C. Sec. 592. But in others Congress has pre-

[5] But see *United States v. Patton*, 120 F. (2d) 73 (C. C. A. 3), discussed *infra*, Point II, where the court held that "larceny" in the statute means larceny at common law. This, however, is not larceny under state law.

scribed the punishment, without stating whether the crime created was a felony or a misdemeanor. Section 2(a) is itself an example. For violation of any of its provisions, except the theft of any property, money or other thing of value not exceeding fifty dollars, the penalty is fixed at imprisonment for more than one year. Each violation so punishable is a felony by reason of Section 335 of the Federal Criminal Code, 18 U. S. C. Sec. 541 (Appendix A, *infra*, p. 30, which provides that all offenses (under federal law) which may be punished by death or imprisonment for a term exceeding one year, shall be deemed felonies, and all others shall be deemed misdemeanors.[6] Thus if a federal statute declares the offense created a felony or a misdemeanor, it is unnecessary to look further. If the statute is silent, it must be considered in connection with Section 335 of the Federal Criminal Code to see whether the crime is a felony. In either event, if the offense is felonious, the next inquiry is whether it is a felony affecting the bank. See pp. 8-11, *supra*. If the answer is affirmative, then and then only is there a felony within the meaning of the Bank Robbery Act.

---

[6] The Government states emphatically that Section 335 of the Criminal Code is a classification, not a definition of felonies. See Gov. Br. pp. 29-31. This Court in *Bannon* v. *United States*, 156 U. S. 464, at 468, and *Redgan* v. *United States*, 157 U. S. 301, at 303, thought that statutes like Section 335 are statutory definitions of "felony". Whether it is one or the other, is immaterial. The fact of the matter is that Section 335 of the Criminal Code determines what Federal offenses (not specifically named by Congress as felonies or misdemeanors) are federal felonies, just as Section 8750 of the *Vermont Public Laws* (1933), entitled "Definitions," determines what Vermont offenses are Vermont felonies. Apparently the Government would use Section 8750 to define "felony" in a federal statute, but would use Section 335—Congress' own conception of felony—"chiefly . . . in applying certain statutes specifying a different procedure for felony trials . . ." Gov. Br. pp. 30-31. But Section 335 must certainly be used in connection with statutes defining federal offenses to determine the meaning of "felony," not only in Section 287 of the Judicial Code, which the Government cites, but also in statutes like 18 U. S. C. Sec. 612, and the Bank Robbery Act.

There can be little doubt that the meaning of the phrase "any felony" must be found in federal statutes. Compare *Seaboard Air Line Railway* v. *Horton*, 233 U. S. 492, 503, in which the Court held that by the phrase in the Federal Employers' Liability Act of April 22, 1908, "any statute enacted for the safety of employees," Congress meant only federal, not state statutes enacted for the safety of employees. The second clause of Section 2(a) of the Bank Robbery Act, the other provisions of the Act and all other federal laws dealing with felonies which may affect banks are in *pari materia*, because they relate to the same matter —felonious crimes against national or insured banks. These must be considered together. *United States* v. *Freeman*, 3 How. 556, 564; *Moore* v. *Chesapeake & Ohio Ry.*, 291 U. S. 205, 210; *United States* v. *Stewart*, 311 U. S. 60, 64. This done, the phrase "any felony" assumes the meaning intended by Congress. Robbery is a federal felony affecting the bank.[7] Another federal felony affecting banks besides robbery which would be included in "any felony" may be found in the National Stolen Property Act, 48 Stat. 794, as amended 53 Stat. 1178 (18 U. S. C. Secs. 413-19, especially Sec. 416). Still others are felonies affecting banks created by Congress in later legislation, as, for example, the concealment, storage or other disposition of property in violation of Section 2(c). Entry into a bank with intent to rob it or to pledge or sell securities in violation of the National Stolen Property Act or to place in a safety deposit property

[7] Under the Bank Robbery Act, larceny of more than $50.00 from the bank is a federal felony. But it is expressly covered by "any felony or larceny." The lower court thought that larceny was undefined in the Act (R. 5), even though it had previously stated that one of the purposes of the 1937 amendment was to add "larceny" to the Act. R. 4. The fact that the meaning of "larceny" is to be found in federal law without reference to state law naturally leads to the same conclusion as to the companion word "felony."

taken from another bank by robbery or larceny, would be entry with intent to commit the type of felony included in the Bank Robbery Act. See also 12 U. S. C. Secs. 596-97.

Moreover, in construing other federal statutes, the courts of the United States have held that the meaning of "felony" must be found in the laws of Congress, never in those of the states unless Congress expressly adopts them. The leading case is *United States* v. *Coppersmith*, 4 Fed. 198 (C. C. W. D. Tenn.). The statute involved was Section 819 of the Revised Statutes (now Jud. Code, Sec. 287, 28 U. S. C. Sec. 424) which provided:

> "When the offense charged is treason or a capital offense, the defendant shall be entitled to twenty and the United States to five peremptory challenges. On the trial of *any other felony*, the defendaant shall be entitled to ten and the United States to three peremptory challenges * * *". (Italics supplied.)

One of the defendant's contentions was that the term "felony" should be given the meaning it had acquired in American law by force of state legislation. 4 Fed. at 198, 203. The court refused to apply state laws, stating that it would do so only if Congress *adopted* them. At the time Congress had not enacted Section 335 of the Criminal Code. The court summarized its construction of the statute as follows (4 Fed. at 207):

> " * * * the clause under consideration may operate, in other than capital cases, to give the defendant 10 challenges in the following classes of cases: *First*, where the defense [*sic*] is declared by statute, expressly or impliedly, to be a felony; *second*, where congress does not define an offense, but simply punishes it by its common-law name, and at common law it is a felony; *third*, where congress adopts a state law as to an offense, and under such law it is a felony."

This rule of construction has been approved again and again.[8]

Congress has repeatedly sanctioned these views in numerous statutes. When it desires to incorporate state penal provisions, it does so by specific reference or adoption. Many of the statutes are collected in Appendix B, *infra*, pp. 32-36. For example, by the Act of July 7, 1898, 30 Stat. 717, as amended, 35 Stat. 1145 (18 U. S. C. Sec. 468), which deals with lands over which the Federal Government has jurisdiction, but which are within the territorial limits of the states, Congress provided that if a person does or omits to do an act which is not made penal by any of its own laws, but which "if committed or omitted within the jurisdiction of the State * * * in which such place is situated, *by the laws thereof now in force would be penal*, shall be deemed guilty of a like offense and be subject to a like punishment * * *." (Italics supplied.) The lower court construed the Bank Robbery Act as if it had the italicized language. In the light of the established practice of Congress, the omission of specific reference or adoption of state laws is very significant evidence that Congress did not intend to include felonies under state law.[9] It is familiar law that a statute should not be given an extended mean-

---

[8] *United States* v. *De Quilfeldt*, 5 Fed. 276, 279 (C. C. W. D. Tenn.); *United States* v. *Daubner*, 17 Fed. 793, 794-5 (E. D. Wis.); *In re Wilson*, 18 Fed. 33, 34 (E. D. Mich.); *United States* v. *Falkenheimer*, 21 Fed. 624, 627 (C. C. D. Mo.); *Considine* v. *United States*, 112 Fed. 342, cert. denied, 184 U. S. 699; *Hallock* v. *United States*, 185 Fed. 417, 424 (C. C. A. 8), cert. denied, 220 U. S. 613. See also *United States* v. *Baugh*, 1 Fed. 784, 788 (E. D. Va.): "Under the federal laws nothing is felony unless expressly so declared to be by Congress, with exception of capital offences." See *Bannon* v. *United States*, 156 U. S. at 468; *Reagan* v. *States*, 157 U. S. at 303.

[9] The Government cites several statutes to show that Congress has often built upon state law. Gov. Br. pp. 15-16. Several expressly refer to state law. Those which do not, prohibit the transportation of "stolen" property. But the word "stolen" does not import state law. It has a common-law or popular significance, and there is therefore no need to refer to state law. *Russell* v. *United States*, 119 F. (2) 686, 688 (C. C.

ing when it "would have been easy to say so" if the legislature had intended that meaning.[10] *Farrington* v. *Tennessee*, 95 U. S. 679, 689; *United States* v. *Mangus*, 33 F. Supp. 596 (N. D. Ind.). In this case the failure to refer to state law is conclusive, first, because the definition of burglary is complete and effective without the importation of state felonies and, secondly, because Congress specifically rejected the 1934 bill which expressly adopted felonies under the laws fo the states. See pp. 19-20, *infra*.

The statute, on its face, is clearly directed at federal felonies against national and insured banks. The statute requires no aid from state statutes, and it certainly does not incorporate them by reference or by any other means, except possibly by implication. It is well settled, however, that penal statutes should not be expanded by construction, but should be strictly construed in favor of the accused. They cannot be extended by inference to acts which are not clearly within their terms. *Todd* v. *United States*, 158 U. S. 278, 282; *United States* v. *Gradwell*, 243 U. S. 476, 485; *Pasulo* v. *United States*, 272 U. S. 620, 629; *United States* v. *Resnick*, 299 U. S. 207, 209.

In its brief (p. 10), the Government has cited a number of cases holding that the "words 'any felony' had been used for the purpose of describing both state and federal felonies in state statutes dealing with such matters as punishment of habitual criminals, disbarment of attorneys and fitness to hold public office." But these cases are distinguishable. Moreover, they run counter to the well-established practice of Congress and to the settled construction of federal statutes.

A. 8); *United States* v. *Cohen*, 274 Fed. 596, 597 (C. C. A. 3); *Crabb* v. *Zerbst*, 99 F. (2d) 562, 565 (C. C. A. 5); *United States* v. *Trinder*, 1 F. Supp. 659, 660 (D. Mont.). Also, see R. 11, n. 3.

[10] See also *National Bank* v. *Matthews*, 98 U. S. 621, 627; *Railroad Company* v. *Grant*, 98 U. S. 398, 403; *United States* v. *Chase*, 135 U. S. 255, 259; *Commissioner* v. *Beck's Estate*, 129 F. (2d) 243, 245 (C. C. A. 2).

The state statutes dealing with disbarment of attorneys and fitness to hold office are wide of the point. The issue there is whether the attorney or public officer should continue to exercise functions of public trust. Any violation of law, whether state or federal, is inconsistent with the oath taken to uphold the laws and constitutions of the United States and of the State, and demonstrates unfitness for the high trust reposed in him by the court or the people. Construction of statutes of this kind should be liberal; they are remedial, not criminal. The state statutes on habitual offenders are more nearly penal, although it should be noticed that they do not create or define crimes, but only the punishment. They are not precedents, however, because they specifically refer to felonies in other jurisdictions.[11]

C. The Legislative History of the Bank Robbery Act Shows that Congress Did Not Intend to Include State Felonies.

In 1934 the Attorney General submitted a bill which would have accomplished the purpose which the lower court would

[11] The Kansas statute in *State* v. *Merriweather*, 136 Kan. 377, provides that increased punishment for second or third conviction of felony may be based up "former convictions for felony committed by the prisoner, in or out of the State." *Kan. Gen. Stat.* (1935) Sec. 21-107(a). The next section states that "Every person who shall have been convicted in any of the United States, or in any District or Territory thereof, or in a foreign country, of an offense which if committed in this state would be punishable by the laws of this state by confinement and hard labor, shall upon conviction for any subsequent offense within the state be subject to the punishment herein prescribed upon subsequent convictions, in the same manner and to the same extent as if such first conviction had taken place in a court of this state." *Kan. Gen. Stat.* (1935) Sec. 21-108. See also *People* v. *Bigelow*, 94 Cal. App. 28. The Texas Court in *Arnold* v. *State*, 127 Tex. 89, justified consideration of a prior conviction of a federal felony on the ground that the federal felony was denounced *as a felony by the Texas statutes* and that the conviction was secured in a Federal court in the State of Texas. In effect, this was construing the Texas act as if it read like the Kansas statute.

attribute to the 1937 amendment. Congress refused to enact the bill.

The Attorney General's bill (S. 2841, 73d Cong. 2d Sess.) was passed by the Senate with minor amendments. 78 Cong. Rec. 5738; see S. Rep. No. 537, 73d Cong., 2d Sess. Section 2 made it unlawful to take and carry away, or attempt to take and carry away, anything of value belonging to or in the care of any national bank without its consent or with its consent obtained by trick, artifice, fraud or false or fraudulent representation, with intent to convert to the use of anyone other than the bank. Section 3 prohibited breaking or attempting to break into any bank, "with intent to commit • • • any felony under any law of the United States or under any law of the State, District, Territory, or possession where such building is located • • •."[12] The remainder of the bill was substantially Sections 2, 3 and 4 of the 1934 Act.

The House Committee on the Judiciary, of which Representative Hatton Sumners was chairman, amended the bill by striking out all of Sections 2 and 3. See H. Rep. No. 1461, 73d Cong. 2d Sess. No explanation was given by the committee either in its report or on the floor of the House. The probable explanation is that Sections 2 and 3 made unnecessary inroads upon the functions of the states. The Attorney General, in submitting the bill, had announced that crimes by organized groups of gangsters who moved "rapidly from the scene of one crime of violence to another across state lines" could not be adequately controlled by the states and that federal intervention and legislation were necessary, "limited to the functions which probably can be

[12] This was the customary method of incorporating state law. See p. 16, *supra*. It is significant that the Attorney General was aware of that fact in 1934 and that he did not say "with intent to commit • • • any felony." Yet the lower court and the Government consider the two expressions interchangeable!

efficiently performed only by some central agency." 78 Cong. Rec. 2947. Sections 2 and 3 would have brought within federal jurisdiction all cases in which money was taken fraudulently and in which there had been a breaking into the bank with intent to commit any one of the innumerable felonies under federal and state law. This went far beyond the needs announced by the Attorney General; Representative Sumners "sought throughout the session to confine extensions of federal power to those situations where the need to supplement state and local law enforcing agencies had become imperative." Note, 1 LAW & CONTEMP. PROB. 445, 448-49.

The bill as amended by the Committee was passed by the House, 78 Cong. Rec. 8132, and was submitted to a committee of conference which recommended that the Senate agree to the amendments of the House. See H. Rep. 1598, 73d Cong. 2d Sess. Thereafter the conference report was accepted by both houses, and the bill became law on May 18, 1934.

In 1937 the Attorney General whose proposal had initiated the 1934 Act submitted, and Representative Sumners introduced (81 Cong. Rec. 2731), a bill to amend Section 2(a) of the Bank Robbery Act so as to include burglary and larceny. The original proposal read as follows:

> "* * * whoever shall enter or attempt to enter any bank, or any building used in whole or in part as a bank, with intent to commit in such bank or building, or part thereof, so used, *any larceny or other depredation;* or whoever shall take or carry away, with intent to steal or purloin, any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of any bank, * * *." (Italics supplied.)

In his letter of transmittal, the Attorney General asserted that exclusion of larceny and burglary from the statute had

led to incongruous results. He gave us as example the case of a man who had gained possession of $11,000 of a national bank's funds during the absence of one of the employees but could not be prosecuted under the Act because he had not displayed any force and put anyone in fear. He concluded that the bill as drafted would include within the prohibitions of the statute "the crimes of burglary and larceny of a bank covered by its provisions." (Quoted in H. Rep. No. 732, 75th Cong., 1st Sess.)

The House Committee amended the bill by substituting "any felony or larceny" for "any larceny or other depredation." *Id.* No explanation was given. The only other change in the bill was with respect to the punishment for larceny. Because of objections to the failure to distinguish between robbery and "breaking and entering" to commit larceny on the one hand, and simple larceny on the other (81 Cong. Rec. 4656), the committee offered an amendment which provided the following punishments (*id.* 5376-77):

1. Robbery and burglary: fine of not more than $5,000 or imprisonment of not more than 20 years, or both.

2. Larceny of over $50: fine of not more than $5,000 or imprisonment of not more than 10 years, or both.

3. Larceny not exceeding $50: fine of not more than $1,000 or imprisonment of not more than one year, or both.

With these amendments and with at least some Congressmen under the impression that the bill defined burglary as "breaking and entering," the House passed the bill. The Senate accepted it without question or discussion. 81 Cong. Rec. 5409, 9198, 9331. The bill became law on August 24, 1937. 50 Stat. 749, c. 747.[13]

---

[13] The lower court attached some significance to the amendment in 1940, making it a crime to "receive, possess, conceal, store, barter, sell, or dispose of any property, knowing it to have been taken from a bank in violation of subsection (a) * * *." 54 Stat. 695, adding (c) to Sec-

The Government's conclusion that the legislative history reflects the desire of Congress to include both state and federal felonies (Br. p. 11 *et seq.*) is startling. In 1934 Congress rejected the bill proposed by the Attorney General, which included "any felony. * * * under any law of the State * * *." In 1937 the same Attorney General recommended a bill which contained no reference to felonies under state law. (He undoubtedly remembered Congressional objection to the too wide scope of his 1934 proposal.) The phrase "larceny or other depredation," apparently taken from Section 192 of the Criminal Code (18 U. S. C. Sec. 315), in no way depended upon state law.[14] The House Committee which substituted "felony" for "depredation" made no specific reference to state laws. As we have shown above, unless there is express adoption of state law, the meaning of "felony" must be found in federal law. The conclusion is inevitable that no one who had anything to do with the 1937 bill thought that it would adopt the penal provisions of forty-eight states with respect to acts committed in national and insured banks.

The purpose of the Attorney General, approved and adopted by the House and Senate Committees, was to avoid incongruous results, not to achieve them. He was interested in federal prosecution of burglars and thieves. He

---

tion 2. It thought subsection (c) would be "sadly limited," if the burglary clause were construed to include only federal felonies. See R. 6. There are at least two answers: (1) Subsection (c) will surely apply to property taken from the bank by robbery or larceny. (2) The court overlooked the nature of the crime of burglary. The offense is complete when there has been an entry with the requisite intent. Commission of the felony intended is unnecessary. *Cf.* 4 BLACKSTONE COMM. 227-28; 1 HALE P. C. 561-62. Hence subsection (c) must have been aimed at receivers of property taken in the course of robbery or larceny in violation of subsection (a). See H. Rep. No. 1668, 76th Cong., 3d Sess.

[14] When this Court construed "depredation," (as used in the Postal Laws and Regulations), it referred to the Century Dictionary, not to laws of the locality. *Deal* v. *United States*, 274 U. S. 277, 283.

wanted to punish those who stole away with $11,000 of the bank's money. These ends are attained by construing "felony" as felony under Congress' own statutes. In expanding that term to include state felonies, the lower court and the Government attribute to the Attorney General and Congress extravagant purposes. In 1937 neither would have said that the bill was directed at a man who gave the bank his own note for $500 with a forged endorsement, or a check for $42.50 with insufficient funds on deposit (*Hudspeth* v. *Melville*, 127 F. (2d) 373), or a forged check for $119 (*Hudspeth* v. *Tornello*, 128 F. (2d) 172). These are not the crimes with which state authorities had become unable to cope and with respect to which the need to supplement state and local law had become imperative. Nor are they crimes whose omission in 1934 had led to incongruous results. Moreover, if these were offenses which the Federal Government should prosecute, it would have been very simple to make them federal crimes.[15] In effect the Government is seeking to introduce by way of the burglary clause the fraud provisions rejected by Congress in 1934. It was unsuccessful in its efforts to accomplish this result by charges of larceny or entry with intent to commit larceny. *United States* v. *Patton*, 120 F. (2d) 73 (C. C. A. 3); *United States* v. *Mangus*, 33 F. Supp. 596 (N. D. Ind.)

Nor does construction of "felony" as federal felony reduce the burglary clause "to a mere prohibition against attempts to commit robbery or larceny" (Gov. Br. p. 26). The burglary is complete upon entry with the intent to rob, steal or do acts prohibited by the National Stolen Property Act or Section 2(c) of the Bank Robbery Act. There is no attempt to rob or steal if the intent is immeditely aban-

[15] The awkward and irrational results of the construction by the lower court are effectively described by Judge Frank in his dissent. See R. 13-14.

doned upon entry into the bank, without taking further steps toward translating the intent into action coming close to perpetration of robbery or larceny. *People* v. *Thomas*, 63 Cal. 482; see WHARTON, CRIMINAL LAW (10th ed.) Sec. 181. Furthermore, even if the attempt were complete upon entry, the burglary clause would be needed for attempts to commit larceny or acts prohibited by Section 2(c) of the statute or by the National Stolen Property Act (18 U. S. C. Sec. 416). Congress has not prohibited attempts to commit these three types of federal felonies. In any event, if the robbery or larceny or other felony is completed, prosecution for that offense is not a bar to prosecution for burglary. *Morgan* v. *Devine*, 237 U. S. 632; *Carpenter* v. *Hudspeth*, 112 F. (2) 126 (C. C. A. 10), cert. denied, 311 U. S. 683; *Territory* v. *Willard*, 8 Mont. 328; *cf. Ebeling* v. *Morgan*, 237 U. S. 625; *Albrecht* v. *United States*, 273 U. S. 1, 11; *United States* v. *Noveck*, 273 U. S. 202, 206.

Finally, the legislative history is said to reflect a purpose and pattern of building upon state and common law [18] to complement state enforcement (Gov. Br. pp. 11-13, 16-17, 20, 26-29; *cf.* R. 4-5). No doubt, Congress did intend to supplement local enforcement where the state, county and municipal officials were unable to cope with the criminals. See H. Rep. No. 1461, 73d Cong., 2d Sess., p. 2; *cf.* 78 Cong. (Rec. 2947). There never was any showing that state authority had become so feeble as to require Federal aid in dealing with minor frauds. But Congress clearly had no intention of building on state law, for it rejected the bill which specifically adopted the felony provisions of the

---

[18] Both the lower court and the Government have lumped state and common law indiscriminately. See R. 4-5; Gov. Br. 16-17, 26-28. But the common law concept of intent to commit a felony is vastly different from the statutory modifications now in force in most states. See Point II, *infra*, pp. 26-28.

states and three years later enacted a statute which omitted any reference to state law.

Congress itself defined the offenses under Federal law. There is no need to look at state law to determine whether there has been robbery, burglary or larceny of a national bank. Congress has provided that a bank has been robbed when anyone "by force and violence, or by putting in fear, feloniously takes * * * from the person or presence of another" property belonging to or in the possession of the bank; that larceny has occurred when someone has taken and carried away, "with intent to steal or purloin," property belonging to or in the possession of the bank; that burglary has been committed by entry into the bank, with intent to commit "any felony or larceny." Larceny is defined in the same statute. Felony is not, but the Bank Robbery Act itself contains two felonious offenses against banks (Section 2(a), (c)) and other federal statutes create and punish more felonies against banks. How can it be said that Congress has built upon state law? What can the law of Vermont supply? Certainly, it cannot change the elements of robbery or larceny, and there is no reason to suppose that Congress built upon state law in only one clause—that defining burglary. Sections 8400-01 of the Vermont Public Laws (1933) confine robbery to taking from the person. Nothing is said about taking from the "presence of another." Nor is the omission cured by considering these two sections with Section 8442, since the crime under that section, larceny from the person, is separate and distinct from robbery and does not require violence or putting in fear. Section 8440 defines grand larceny (a felony) as the stealing of property exceeding twenty-five dollars in value. Under the Federal statute larceny of twenty-five dollars to fifty dollars is a misdemeanor. Burglary under the state penal code is quite different from

burglary in the Bank Robbery Act. Under Sections 8436-37, burglary consists of breaking and entering into places in which personal property, the subject of larceny, is situated "with intent to commit murder, rape, robbery, larceny or other felony." Surely Congress did not build upon the law of Vermont or any other state.[17]

II. The Bank Robbery Act requires entry with intent to commit a common-law felony affecting the bank.

As stated above, we suggest, in the alternative, that if "felony" is not to be construed as felony under federal law, the term should be given its common-law meaning. This suggestion accepts the Government's contention that in "case of doubt * * * the common law background of such phrases as 'with intent to commit * * * any felony' furnishes a better guide to the proper interpretation of the statute than any distinction between state crimes and federal." Gov. Br. p. 17. It may be that Congress may have had the intention of building upon the common law and that "it retained in the definition of the offense [burglary] the classic element of entry with intent to commit a felony." Gov. Br. p. 27. But if this be true, the "classic element" should be accorded "classic" significance. Entry with intent to utter a forged endorsement is not within the common-law conception of entry with intent to commit a felony, because the uttering was a misdemeanor at common law. See p. 6, *supra*. At common law only murder, manslaughter, arson, burglary, robbery, rape, sodomy, mayhem and larceny were felonies. See WHARTON,

[17] Nor could it have built the offense of burglary of banks upon the law of New Jersey, which classifies crimes as misdemeanors and high misdemeanors. *United States* v. *Slutzky*, 79 F. (2) 504 (C. C. A. 3). Uttering a promissory note with a forged endorsement is a "high misdemeanor," not a "felony." *N. J. Rev. Stat.* (1937) Sec. 2: 132-1b. *See United States* v. *Nickerson*, D. N. J., No. 864C, decided Nov. 30, 1942, which the Government has appealed or intends to appeal to this Court.

CRIMINAL LAW (10th ed.) Sec. 22; CLARK AND MARSHALL, CRIMES (3d ed.) Sec. 3.

This view of the statute is not without plausibility.[18] In *United States* v. *Patton*, 120 F. (2) 73 (C. C. A. 3), the court held that "larceny" in the burglary clause of the Bank Robbery Act should be given its common-law meaning because it believed that "larceny" was not defined in the statute. It applied the well-settled principle that (120 F. (2) at 75) "when a Federal statute uses a term known to the common law to designate a common law offense and does not define the term, courts called upon to construe it should apply the common law meaning." See, *e. g.*, *United States* v. *Palmer*, 3 Wheat. 610, 630, 640, 643 (robbery); *United States* v. *Smith*, 5 Wheat. 153, 160 (robbery, murder); *Harrison* v. *United States*, 163 U. S. 140, 142 (rob); *Oliver* v. *United States*, 230 Fed. 971, 973 (C. C. A. 9); cert. denied, 241 U. S. 670 (rape); *Levinson* v. *United States*, 47 F. (2) 470 (C. C. A. 6) (forge). See nn. 8, 9, *supra*.

The term "felony" had a well-defined meaning at common law. It referred to the crimes of murder, manslaughter, arson, burglary, robbery, rape, sodomy, mayhem and larceny. These were the serious offenses punishable by death, or by forfeiture of the lands or goods of the offender. The Court has recognized that as the common-law meaning of felony. See *Ex parte Wilson*, 114 U. S. 417, 423; *Bannon* v. *United States*, 156 U. S. 464, 467-8; *Reagan* v. *United States*, 157 U. S. 301, 303.

If the Court should decide that Congress has not sufficiently defined "felony" for all purposes under Federal law, it should accord the word the meaning it possessed at common law. If this be done, the indictment does not charge an offense known to the laws of the United States, since the petitioner did not enter the national bank at Burlington, Vermont, with intent to commit a common-law

[18] The District Court of New Jersey has held that "any felony" means any common-law felony. *United States* v. *Nickerson*, cited p. 17, *supra*.

felony. As pointed out above, utterance of a promissory note with a forged endorsement was, at most, a misdemeanor at common law.

Conclusion.

For the reasons above state, it is respectfully submitted that the indictment does not charge an offense within the meaning of the Bank Robbery Act and the judgment below should be reversed.

JOHN T. SAPIENZA,
Counsel for Petitioner.

January 1943.

APPENDIX A.

The Act of May 18, 1934, c. 304, 48 Stat. 783, as amended by the Act of August 23, 1935, c. 614, 49 Stat. 720, the Act of August 24, 1937, c. 747, 50 Stat. 749, and the Act of June 29, 1940, c. 455, 54 Stat. 695, 12 U. S. C. (Secs. 588(a) and 588(b)), provides as follows:

* * * as used in this Act the term "bank" includes any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States and any insured bank as defined in subsection (c) of Section 12B, of the Federal Reserve Act, as amended.

Sec. 2. (a) Whoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management or possession of, any bank; or whoever shall enter or attempt to enter any bank, or any building used in whole or in part as a bank, with intent to commit in such bank or building, or part thereof, so used, any felony or larceny, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both; or whoever shall take and carry away, with intent to steal or purloin, any property or money or any other thing of value exceeding $50 belonging to, or in the care, custody, control, management, or possession of any bank, shall be fined not more than $5,000 or imprisoned not more than ten years, or both, or whoever shall take and carry away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $50 belonging to, or in the care, custody, control, management or possession of any bank, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(b) Whoever, in committing, or in attempting to commit, any offense defined in subsection (a) of this section, assaults any person, or puts in jeopardy the life of any person by

the use of a dangerous weapon or device, shall be fined not less than $1,000 nor more than $10,000 or imprisoned not less than five years nor more than twenty-five years, or both.

(c) Whoever shall receive, possess, conceal, store, barter, sell or dispose of any property or money or other thing of value knowing the same to have been taken from a bank in violation of subsection (a) of this section shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

Sec. 3. Whoever, in committing any offense defined in this Act, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be punished by imprisonment for not less than 10 years, or by death if the verdict of the jury shall so direct.

Sec. 4. Jurisdiction over any offense defined by this Act shall not be reserved exclusively to courts of the United States."

Subsection (c) of Section 12B of the Federal Reserve Act, as amended by the Act of August 23, 1935, c. 614, 49 Stat. 684 (12 U. S. C. Sec. 264(c)) defines "insured bank" as follows:

"The term 'insured bank' means any bank the deposits of which are insured in accordance with the provisions of this section; * * *"

Section 335 of the Federal Criminal Code, Act of March 4, 1909, c. 321, 35 Stat. 1152, as amended by the Act of December 16, 1930, c. 15, 46 Stat. 1029 (18 U. S. C. Sec. 541), defines felonies under federal law.

"All offenses which may be punished by death or imprisonment for a term exceeding one year shall be deemed felonies. All other offenses shall be deemed misdemeanors. * * *"

Sections 8484-85 of the Public Laws of Vermont (1933) define utterance of forged or counterfeited instruments as follows:

"Sec. 8484. *Papers, documents, etc.* A person who wittingly, falsely, and deceitfully makes, alters, forges or counterfeits, or wittingly, falsely or deceitfully causes to be made, altered, forged or counterfeited, or procures, aids, or counsels the making, altering, forging, or counterfeiting, of a writ, process, public record, or any certificate, return or attestation of a clerk of a court, public register, notary public, justice or other public officer, in relation to a matter wherein such certificate, return or attestation may be received as legal proof, or a charter, deed, or any evidence or muniment of title to property, will, testament, bond or writing obligatory, letter of attorney, policy of insurance, bill of lading, bill of exchange, promissory note, or an order drawn on a person or corporation, or on a state, county or town or school district treasurer, for money or other property, or an acquittance or discharge for money or other property, or an acceptance of a bill of exchange, or endorsement or assignment of a bill of exchange or promissory note, for the payment of money, or any accountable receipt for money, goods or other property, or certificate of stock, with intent to injure or defraud a person, shall be imprisoned in the state prison not more than ten years and fined not more than one thousand dollars.

"Sec. 8485. *Uttering Forged or Counterfeited Instrument.* A person who utters and publishes as true a forged, altered or counterfeited record, deed, instrument or other writing mentioned in the preceding section, knowing the same to be false, altered, forged or counterfeited, with intent to injure or defraud a person, shall be imprisoned in the state prison not more than ten years and fined not more than one thousand dollars."

Section 8750 of the Public Laws of Vermont (1933) defines felonies under Vermont law.

"Sec. 8750. *Definitions.* Offenses which may be punished by death or imprisonment in the state prison are felonies; all other offenses are misdemeanors."

APPENDIX B.

Federal Criminal Provisions Dependent Upon State Law.[1]

1. Act of March 3, 1917, 39 Stat. 1069, as amended March 4, 1917, 39 Stat. 1202; February 24, 1919, 40 Stat. 1151 (18 U. S. C. Sec. 341). Repealed June 25, 1936.

"No letter, postal card, circular, newspaper, pamphlet, or publication of any kind containing any advertisement of spirituous, vinous, malted, fermented, or other intoxicating liquors of any kind * * * shall be deposited in or carried by the mails of the United States * * * when addressed or directed to any person, firm, corporation, or association, or other addressee, at any place or point in any State or Territory of the United States, or the District of Columbia, at which it is *by the law in force in the State* or Territory or the District of Columbia at that time unlawful to advertise or solicit orders for such liquors, or any of them, respectively."

2. Act of May 25, 1900, 31 Stat. 188, as amended March 4, 1909, 35 Stat. 1137 (18 U. S. C. Sec. 392).

"It shall be unlawful for any person to deliver to any common carrier for transportation, or for any common carrier to transport from any State, Territory, or District of the United States, to any other State, Territory or District thereof, any foreign animals or birds, the importation of which is prohibited, or the dead bodies or parts thereof of any wild animals or birds, where such animals or birds have been killed or shipped *in violation of the laws of the State*, Territory or District in which the same were killed, or from which they were shipped."

3. Act of May 18, 1934, 48 Stat. 782 (18 U. S. C. Sec. 408e).

"It shall be unlawful for any person to move or travel in interstate or foreign commerce from any State, Territory,

[1] The italics used in this appendix do not appear in the original.

or possession of the United States, or the District of Columbia, with intent either (1) to avoid prosecution for murder, kidnapping, burglary, robbery, mayhem, rape, assault with a dangerous weapon, or extortion accompanied by threats of violence, or attempt to commit any of the foregoing, *under the laws of the place* from which he flees, or (2) to avoid giving testimony *in any criminal proceedings in such place* in which the commission of a felony is charged."

4. Act of July 7, 1898, 30 Stat. 717, as amended March 4, 1909, 35 Stat. 1145 (18 U. S. C. Sec. 468).

"Whoever, within the territorial limits of any State, organized Territory, or District, but within or upon any of the places now existing or hereafter reserved or acquired, described in Section 451 of this Title, shall do or omit the doing of any act or thing which is not made penal by any law of Congress, but which if committed or omitted within the jurisdiction of the State, Territory or District in which such place is situated, *by the laws thereof now in force would be penal*, shall be deemed guilty of a like offense and be subject to a like punishment; and *every such State*, Territorial or District *law* shall, for the purposes of this Section, continue in force, notwithstanding any subsequent repeal or amendment thereof by any such State, Territory or District."

5. Act of March 4, 1909, 35 Stat. 1151, as amended June 19, 1937, 50 Stat. 304 (18 U. S. C. Sec. 542).

"The manner of inflicting the punishment of death shall be the manner prescribed *by the laws of the State* within which the sentence is imposed."

6. Act of February 2, 1903, 32 Stat. 793, as amended March 4, 1909, 35 Stat. 1151 (18 U. S. C. Sec. 549).

"The District Courts of the United States for the District of South Dakota shall have jurisdiction to hear, try, and determine all actions and proceedings in which any person shall be charged with the crime of murder, manslaughter, rape, assault with intent to kill, assault with a

dangerous weapon, arson, burglary, or larceny committed within the limits of any Indian reservation in the State of South Dakota. * * * Any person convicted of the crime of assault with intent to kill, assault with a dangerous weapon, or larceny, committed within the limits of any such reservation, shall be subject to the same punishment as is provided in cases of other persons convicted of any of said crimes *under the laws of the State of South Dakota.*"

7. Act of June 11, 1932, 47 Stat. 301 (18 U. S. C. Sec. 622a).

"For the purpose of cooperating with States * * * in the care and treatment of juvenile offendors, whenever any person under 21 years of age shall have been arrested, charged with the commission of any crime punishable in any court of the United States or of the District of Columbia, and, after investigation by the Department of Justice, it shall appear that such person has committed a criminal offense or is a delinquent *under the laws of any State* that can and will assume jurisdiction over such juvenile and will take him into custody and deal with him *according to the laws of such State* * * * the United States Attorney of the District in which such person has been arrested is authorized to forego the prosecution of such person and surrender him as herein provided."

8. Act of June 25, 1910, 36 Stat. 821 (18 U. S. C. Sec. 722).

"Whenever any person has been convicted of any offense against the United States which is punishable by imprisonment, and has been sentenced to imprisonment and is confined therefor, in any reformatory institution of any State in accordance with Section 705 of this Title, or other laws of the United States, then if such State has laws for the parole of prisoners committed to such institutions by the courts of that State, such person convicted of any offense against the United States shall be eligible to parole on the same terms and conditions and by the same authority and subject to recommittal for violation of such parole in the same manner, as persons committed to such institutions by

the courts of said State, and *the laws of said State* relating to the parole of prisoners and the supervision thereof in such institutions are hereby adopted and made to apply to persons committed to such institutions for offenses against the United States."

9. Act of March 1, 1913, 37 Stat. 699. This act has been repealed.

"That the shipment or transportation, * * * of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory or District of the United States, * * * into any other State, Territory or District of the United States * * * which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, *in violation of any law of such State*, Territory or District of the United States * * * is hereby prohibited."

10. Act of Feb. 22, 1935, 49 Stat. 31 (15 U. S. C. Sec. 715b).

"The shipment or transportation in interstate commerce from any State of contraband oil (defined as 'petroleum which * * * was produced * * * in excess of the amounts permitted to be produced * * * *under the laws of a State* * * *') produced in such State is hereby prohibited. * * *"

11. Act of June 25, 1936, 49 Stat. 1928 (27 U. S. C. Sec. 223).

"(a) Whoever shall import, bring, or transport any intoxicating liquor into any State in which all sales (except for scientific, sacramental, medicinal, or mechanical purposes) of intoxicating liquor containing more than 4 per centum of alcohol by volume are prohibited, otherwise than in the course of continuous interstate transportation through such State, or attempt so to do, or assist in so doing, shall: (1) If such liquor is not accompanied by such permit or permits, license or licenses therefor as are now or here-

after required *by the laws of such State;* or (2) if all importation, bringing, or transportation of intoxicating liquor into such State is prohibited *by the laws thereof;* be guilty of a misdemeanor and shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(b) In order to determine whether anyone importing, bringing, or transporting intoxicating liquor into any State, or anyone attempting so to do, or assisting in so doing, is acting in violation of the provisions of this chapter . . . the definition of intoxicating liquor contained *in the laws of such State* shall be applied, but only to the extent that sales of such intoxicating liquor except for scientific, sacramental, medicinal, and mechanical purposes) are prohibited in such State."